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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARKANSAS DEPARTMENT OF EDUCATION,
VOCATIONAL AND TECHNICAL
EDUCATION DIVISION ..... *Petitioner*

vs.

RICHARD JACOBY, FREDDIE MAE GREEN,
JEAN MARROW, ELSIE SANCHEZ, EVAN SANDERS,
GEORGE THOMAS, BARBARA WHITTAKER,
and SHIRLEY WILLIAMS ..... *Respondents*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE STATES' SOVEREIGN IMMUNITY FROM SUIT, UNDER THE STATES' OWN LAW OR THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, IMMUNIZES UNCONSENTING STATES FROM PRIVATE SUITS IN THEIR OWN COURTS FOR MONETARY RELIEF UNDER THE FAIR LABOR STANDARDS ACT.

II.

WHETHER CONGRESS, EXERCISING ITS POWER UNDER THE COMMERCE CLAUSE, CAN VALIDLY SUBJECT UNCONSENTING STATES TO SUITS FOR MONETARY RELIEF BY THE STATES' CITIZENS IN THE STATES' OWN COURTS WHEN CONGRESS CANNOT VALIDLY SUBJECT UNCONSENTING STATES TO SUCH SUITS IN THE FEDERAL COURTS.

LIST OF PARTIES

The parties to this proceeding are as follows: The petitioner is the Arkansas Department of Education, Vocational and Technical Education Division. The respondents are eight individuals – Richard Jacoby, Freddie Mae Green, Jean Marrow, Elsie Sanchez, Evan Sanders, George Thomas, Barbara Whittaker, and Shirley Williams.

Because this proceeding draws into question the constitutionality of an Act of Congress, and neither the United States nor any federal department, office, agency, officer or employee is a party, 28 U.S.C. § 2403(a) may apply. A copy of this Petition has, accordingly, been served on the Solicitor General of the United States.

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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

Petitioner Arkansas Department of Education, Vocational and Technical Education Division, respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of Arkansas in this case.

OPINIONS DELIVERED BELOW

The opinion of the Supreme Court of Arkansas is reported at 331 Ark. 508, 962 S.W.2d 773 (1998), and is printed in its entirety at Appendix A hereto. The order of the Circuit Court of Pulaski County, Arkansas, is un-

reported and is printed in its entirety at Appendix B hereto. The order of the Supreme Court of Arkansas denying a petition for rehearing is unreported and is printed in its entirety at Appendix C hereto.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The opinion of the Supreme Court of Arkansas was delivered on February 19, 1998 (see Appendix A). On March 26, 1998, the Supreme Court of Arkansas denied petitioner's timely petition for rehearing (see Appendix C). This petition is filed within the time allowed by law. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution states:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

Amendment 11 to the United States Constitution states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Article V, Section 20 of the Arkansas Constitution of 1874 states:

> The State of Arkansas shall never be made defendant in any of her courts.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 207 states in pertinent part:

> (a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions
>
> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one half times the regular rate at which he is employed.

29 U.S.C. § 216(b) states in pertinent part:

> Any employer who violates the provisions of [29 U.S.C.] section 206 or 207 . . . shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages. . . . An action to recover the liability prescribed in . . . the preceding sentence [] may be maintained against any employer (including a public agency) in any Federal or

> State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

Arkansas Code Annotated § 19-10-204(a) (Michie 1998 Repl.) states:

> Except as otherwise provided by law, the Arkansas State Claims Commission shall have exclusive jurisdiction over all claims against the State of Arkansas and its several agencies, departments, and institutions but shall have no jurisdiction of claims against municipalities, counties, school districts, or any other political subdivisions of the state.

STATEMENT OF THE CASE

Petitioner, Arkansas Department of Education, Vocational and Technical Education Division (hereinafter "ADE") is an arm of the State of Arkansas which, through an entity known as Arkansas Rehabilitation Services, operates the Hot Springs Rehabilitation Center in Garland County, Arkansas. Respondents are eight employees of ADE who worked at the Hot Springs Rehabilitation Center.

Respondents initially filed suit against petitioner in the United States District Court for the Eastern District of Arkansas, seeking monetary relief for petitioner's alleged violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. After this court issued its opinion in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), petitioner moved to dismiss respondents' federal court action on the ground that Congress had not validly abrogated petitioner's sovereign im-

munity by enacting the FLSA, which was passed pursuant to Congress' power under the Interstate Commerce Clause of the United States Constitution. *See, e.g., Moad v. Arkansas State Police Department*, 111 F.3d 585 (8th Cir. 1997). Before the district court could rule on the motion, respondents filed a voluntary nonsuit.

Thereafter, respondents filed the instant action against petitioner in the Circuit Court of Pulaski County, Arkansas, again alleging that petitioner had violated the FLSA. Respondents' complaint seeks monetary relief in the form of unpaid overtime compensation, liquidated damages, pre- and post-judgment interest, costs, and attorneys' fees. Petitioner moved to dismiss the complaint as barred by the Eleventh Amendment to the United States Constitution and Article 5, § 20 of the Arkansas Constitution, which provides that the State "shall never be made defendant in any of her courts." Petitioner argued that the proper forum for respondents' claims was the Arkansas State Claims Commission, an arm of the Arkansas General Assembly which is empowered to hear and decide claims for monetary relief against the State of Arkansas and its agencies, departments and institutions.[1]

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[1] *See* Ark. Code Ann. §§ 19-10-201, 19-10-204(a). While the Arkansas State Claims Commission is not bound by the formal rules of evidence such as the Federal or Arkansas Rules of Evidence [*see* Ark. Code Ann. § 19-10-210(b)(1)], the Commission is directed to "conduct all hearings publicly and in a fair and impartial manner, giving the parties full opportunity for presentation of evidence, cross-examination of witnesses, and argument." *Id.* The Commission is also directed, to the extent practicable, to adopt the procedures of the Arkansas Chancery Courts and conduct its hearings in "a judicial manner." Ark. Code Ann. § 19-10-210(b)(2). The decisions of the Claims Commission can only be appealed to the Arkansas General Assembly. Ark. Code Ann. § 19-10-211.

The Circuit Court dismissed respondents' action as barred by the State's sovereign immunity and found that the Arkansas State Claims Commission was the proper forum for respondents' claims. See Appendix B. Respondents appealed the dismissal to the Supreme Court of Arkansas.

On February 19, 1998, the Supreme Court of Arkansas unanimously reversed the trial court's dismissal and remanded the case to Circuit Court for further proceedings. The Supreme Court reasoned that while the Eleventh Amendment to the United States Constitution immunized petitioner from FLSA suits brought by citizens in the federal courts, the Eleventh Amendment did not immunize petitioner from such suits when they are brought in the State's own courts. Further, relying upon this Court's decisions in *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991) and *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990), the Arkansas Supreme Court held that the State's sovereign immunity under Article 5, § 20 of the Arkansas Constitution could not be interposed as a bar to state-court suits for monetary relief under the FLSA because to do so would violate the Supremacy Clause of the United States Constitution. See Appendix A.

Respondent filed a timely petition for rehearing, which

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[1]continued

As the Supreme Court of Arkanas explained in *Fireman's Ins. Co. v. Arkansas State Claims Commission*, 301 Ark. 451, 455-57, 784 S.W.2d 771 (1990), *cert. denied*, 498 U.S. 824 (1990), the Arkansas General Assembly created the Claims Commission to allow the General Assembly to process, review and pay the "just and legal debts of the state" while preserving the State's sovereign immunity from suit.

was denied by the Arkansas Supreme Court on March 26, 1998. See Appendix C.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT THIS PETITION TO RESOLVE A SPLIT AMONG STATE COURTS ON THE QUESTION OF WHETHER THE STATES' SOVEREIGN IMMUNITY BARS PRIVATE FLSA SUITS AGAINST UNCONSENTING STATES IN STATE COURTS.

Prior to this Court's decision in *Seminole Tribe*, courts had generally assumed that, under the plurality opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), Congress could and had validly abrogated the States' sovereign immunity from suits for monetary relief under the FLSA. *See, e.g., Hale v. State of Arizona*, 993 F.2d 1387, 1391 (9th Cir. 1993) (en banc). However, after this Court, in *Seminole Tribe*, overruled *Union Gas*, the lower federal courts recognized that because the FLSA was enacted pursuant to Congress' power under the Commerce Clause, Congress did not effectively abrogate the States' sovereign immunity from FLSA claims in the federal courts. *See, e.g., Close v. New York*, 125 F.3d 31 (2d Cir. 1997); *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997); *Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir. 1997); *Moad, supra*, 111 F.3d 585. However, some of these post-*Seminole Tribe* decisions dismissing FLSA suits against States suggested in *dicta* that private plaintiffs could still pursue their FLSA suits against unconsenting States in state courts.[2]

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[2]*See, e.g., Aaron v. Kansas, supra*, 115 F.3d at 817 ("[E]mployees can sue in state court for money damages under the FLSA as a state

In its ruling below, the Supreme Court of Arkansas held that, under the FLSA, unconsenting States can be sued in their own courts by their own citizens notwithstanding the States' Eleventh Amendment immunity from such suits in the federal courts. The Court below further reasoned that the Supremacy Clause prohibited unconsenting States from asserting sovereign immunity from suit in their own courts as a bar to FLSA suits brought in the state courts. The Supreme Court of Arkansas' decision below is part of a conflict among the courts of several States that this Court should resolve.

The conclusion of the Supreme Court of Arkansas below is consistent with the Tennessee Supreme Court's decision in *Clover Bottom Hospital and School v. Townsend*, 513 S.W.2d 505 (Tenn. 1974) (sovereign immunity no defense to private FLSA suit in state court) and a recent ruling of a lower court in the State of Iowa (see *Raper v. State of Iowa*, No. CL 68918 (District Court for Polk County, October 23, 1997) (denying the State's motion to dismiss the plaintiffs' FLSA suit on sovereign immunity grounds). However, the Supreme Court of Arkansas' decision below is in direct conflict with the decisions of courts in numerous other states, which hold that unconsenting States cannot be sued in their own courts under the FLSA. *See Mossman v. Donahey*, 46 Ohio St.2d 1, 346 N.E.2d 305 (Ohio 1976) (sovereign immunity bars FLSA

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[2]continued

court of general jurisdiction is obligated by the Supremacy Clause to enforce federal law."); *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (1996), *amended on petition for rehearing*, 107 F.3d 358 (6th Cir. 1996) (same); *Rehberg v. Dept. of Public Safety*, 946 F.Supp. 741, 743 (S.D. Iowa 1996) (same).

claims against state in state court); *cf. Keller v. Dailey*, 1997 WL 781897 (Ohio App. 10 Dist., December 16, 1997) (sovereign immunity bars state-court action for money damages under the FLSA in state court of general jurisdiction; proper forum was state Court of Claims); *German v. Wisconsin Dep't of Transportation*, No. 96-CV-1261 (Wis. Circuit Court, March 8, 1997) (state-court FLSA suit against state barred by sovereign immunity); *Alden v. State of Maine*, No. CV-96-751 (Maine Superior Court, July 18, 1997) (same); *Bunch v. Robinson*, No. 97006017 (Baltimore City Circuit Court, Sept. 11, 1997) (same); *Allen v. Fauver*, No. ESX-L-3302-94 (New Jersey Superior Court, February 17, 1998) (same); *Whittington v. State of New Mexico Dep't of Public Safety*, No. CV-96-33906 (New Mexico District Court, November 5, 1997) (same).

Moreover, as the Arkansas Supreme Court acknowledged in its opinion below, its conclusions conflict in principle with the decisions of courts in other states which have held that the Supremacy Clause does not render ineffective the immunity of a State from suit in its own courts. See Appendix A at p. A-10 [citing, *inter alia, Morris v. Massachusetts Maritime Academy*, 409 Mass. 179, 185-86, 565 N.E.2d 422 (1991)].

After this Court's decision in *Seminole Tribe* sharply curtailed Congress' ability to validly enact statutes that provide for private suits for monetary relief in federal court against unconsenting States, many individuals turned to the state courts to assert their FLSA claims against the States. The need for guidance from this Court on the availability of state-court forums for such suits, particularly in the face of the States' sovereign immunity, is evidenced by the conflicting decisions cited herein. This case also

presents important questions of federalism and the breadth and reach of the States' sovereign immunity after *Seminole Tribe* from suits under federal statutes enacted pursuant to Congress' power under the Commerce Clause. Resolution of these questions is of utmost concern to the States, which, under the rationale of the case at bar, must submit to private FLSA suits in their own courts notwithstanding their sovereign immunity from such suits in federal courts. The questions presented in this case are also of particular interest to Congress, in that their resolution can clarify whether it can provide for the enforcement of federal law enacted under the Commerce Clause by authorizing private suits for monetary relief against unconsenting States in state courts.

II.

THIS COURT SHOULD GRANT THIS PETITION TO CORRECT THE SUPREME COURT OF ARKANSAS' ERRONEOUSLY NARROW CONSTRUCTION OF THE SCOPE AND EFFECT OF THE STATES' SOVEREIGN IMMUNITY UNDER THE ELEVENTH AMENDMENT AND THE COURT'S ERRONEOUS APPLICATION OF THE SUPREMACY CLAUSE TO DENY THE STATE ITS SOVEREIGN IMMUNITY FROM SUIT IN ITS OWN COURTS.

In its decision below, the Supreme Court of Arkansas erroneously concluded that the States' Eleventh Amendment immunity has no application to suits brought in the States' courts, and incorrectly concluded that the Supremacy Clause obligates the States' courts to hear citizens' FLSA suits against the States even though such suits cannot be maintained in the federal courts. The Su-

preme Court's opinion below ignored the import of this Court's most recent opinions concerning the scope of the States' sovereign immunity in our federal system, and ignored *Seminole Tribe's* teaching that the constitutional "presupposition" that the Eleventh Amendment confirms operates as a substantive limit on Congress' ability to use its Commerce Clause power to subject unconsenting States to private suits.

The text of the Eleventh Amendment does not mention the jurisdiction of state courts. The Amendment speaks solely of "[t]he judicial power of the United States." Thus, it is not surprising that this Court has stated on several occasions that the Eleventh Amendment does not apply in state courts. *Hilton, supra*, 502 U.S. at 204-05 [citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63-64, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 9, n 7, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980); *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), *reh'g denied*, 491 U.S. 917]. But this Court's decisions make it clear that the scope of the States' sovereign immunity under the Eleventh Amendment is not limited by the literal language of the Amendment. *Seminole Tribe* is inconsistent with the notion that sovereign immunity under the Eleventh Amendment only limits the subject matter jurisdiction of the federal courts, and establishes that the States' sovereign immunity, confirmed by the language of the Eleventh Amendment, operates as a substantive constitutional limitation on Congress' ability to use its Commerce Clause power to subject unconsenting States to suits for monetary relief in state courts and federal courts.

In *Seminole Tribe* this Court described the nature of the

States' Eleventh Amendment immunity as follows:

> Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.' *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S.Ct. 2578, 2581, 115 L.Ed.2d 686 (1991). That presupposition, first observed over a century ago in *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), has two parts: First, that each state is a sovereign entity in our federal system; and second, that ' "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." ' *Id.*, at 13, 10 S.Ct., at 506 (emphasis deleted), quoting The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton).

Seminole Tribe, supra, 116 S.Ct. at 1122.

There is nothing in this Court's reasoning in *Seminole Tribe* to suggest that the broad constitutional "presupposition" the Eleventh Amendment confirms varies depending upon the court in which a State is sued, such that a State's consent would be required for a suit in federal court to proceed while a State's consent would not be necessary for a suit in the State's own court to proceed. Indeed, the majority in *Seminole Tribe*, responding to criticism in Justice Stevens' dissent to the effect that the majority's decision would result in there being no remedy for State violations of various federal statutes, noted that its decision left open "several avenues" to ensure the States' compliance with federal law, namely, federal government suits against the States in federal court, suits against State offi-

cials for prospective injunctive relief, and Supreme Court review of "a question of federal law arising from a state court decision *where a State has consented to suit*[.]" *Seminole Tribe, supra*, 116 S.Ct. at 1131, n 14 (emphasis added). Notably absent from the majority's list of available methods to enforce federal law was any mention of a citizen's ability to sue a State in the State's court without the State's consent.

Further, in overruling *Union Gas* and concluding that Congress could not use its Commerce Clause power to abrogate the States' sovereign immunity, *Seminole Tribe* established that the "presupposition" confirmed by the Eleventh Amendment constitutes a substantive limitation on Congress' power to subject the States to monetary liability to citizens when Congress legislates pursuant to the Commerce Clause:

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.

Seminole Tribe, supra, 116 S.Ct. at 1131.

As a result, because Congress in enacting the FLSA pursuant to the Commerce Clause did not and could not effectively abrogate the States' immunity from suit in federal court, it likewise did not and could not effectively

abrogate the States' immunity from FLSA suits in the States' own courts. To hold otherwise, as the Supreme Court of Arkansas has done, creates a paradoxical situation – in which States could be sued in their own courts when they could not be sued under the same federal statute in the federal courts[3] – that is plainly inconsistent with the notion of the States as "sovereigns" in our federal system,[4] the underlying "presupposition" which the Eleventh Amendment confirms.

In addition to adopting an unduly narrow view of the nature, scope and effect of the States' Eleventh Amendment immunity, the Court below erred in relying upon *Hilton* and *Howlett* to reach its conclusion that the States are powerless to object to private FLSA suits brought against them in their own courts. The question presented to this Court in *Hilton* was whether, as a matter of statutory interpretation, the Federal Employers' Liability Act ("FELA") authorized a cause of action against a state-own-

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[3] In *Hilton* the majority agreed that "making a State's liability or immunity, as the case may be, the same in both federal and state courts, has much to commend it. It also avoids the federalism-related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery under a congressional statute." *Hilton, supra*, 502 U.S. at 206.

[4] In his concurring opinion in *Employees v. Dept. of Public Health & Welfare*, 411 U.S. 279, 288-89, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), Justice Marshall suggested that a private FLSA suit could proceed in state court even if barred in federal court. *Id.* at 297 (Marshall, J., concurring in result). However, the majority in *Employees* expressly declined to address this issue. *Id.* at 287. In his dissent in *Employees*, Justice Brennan noted that Justice Marshall's reasoning would lead to "the paradoxical conclusion that Missouri can frustrate petitioners' vindication of their federally created rights in federal courts, but is powerless to deny them vindication of these rights in its own courts." *Id.* at 316 (Brennan, J., dissenting).

ed railroad. The case thus required this Court to decide whether to overrule the statutory construction holding of *Parden v. Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964).[5] *Hilton*, *supra*, 502 U.S. at 562-63. Relying heavily upon the doctrine of *stare decisis*, which is at its strongest in cases involving statutory as opposed to constitutional interpretation, this Court refused to overrule *Parden's* statutory construction holding. *Id.* at 563-566, 565 ("The issue becomes, then, a pure question of statutory construction, where the doctrine of *stare decisis* is most compelling."). To the extent the Court's opinion in *Hilton* discussed the issue of whether sovereign immunity could be interposed as a bar to a FELA action brought in state court, however, it must be remembered that *Hilton* was decided before *Seminole Tribe*, which established that Congress could not abrogate the States' sovereign immunity using the Commerce Clause. The continuing validity of *Hilton* on the question of whether sovereign immunity can be interposed as a bar to a state-court FELA suit is, therefore, questionable at best in light of *Seminole Tribe*.

The Arkanas Supreme Court's reliance on *Howlett v. Rose* is similarly misplaced. The question presented in *Howlett* was "whether a state-law defense of 'sovereign immunity' is available to a school board otherwise subject to suit in a Florida court even though such a defense would

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[5] In addition to holding that Congress intended through the FELA to authorize suit for damages against state-owned railroads, the Court in *Parden* held that by entering into the business of operating a railroad a state waived its Eleventh Amendment immunity from suit in federal court. This latter holding was overruled in *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 478, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987).

not be available if the action had been brought in a federal forum." *Howlett, supra*, 496 U.S. at 359. *Howlett* arose from a suit under 42 U.S.C. § 1983 in state court, in which the State's sovereign immunity under state law – which was broader than the State's sovereign immunity from suit under the Eleventh Amendment – was successfully interposed as a defense to the § 1983 claim. The defendant was a local school board that would not have been considered an "arm of the State" that could assert sovereign immunity if the case were brought in federal court. This Court held that the defendant's immunity under state-law sovereign immunity could not be used to bar a § 1983 claim in state court when a sovereign immunity claim would not be available if the action were brought in the federal courts because to do so would constitute an impermissible "discrimination" against a federal cause of action. *Id.*, 496 U.S. at 365-66. This Court further held that to the extent the State's courts refused to entertain "one discrete category of § 1983 claims, when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause." *Id.* at 375.

Howlett bears no resemblance to the case presented here. This case does not present a situation in which a State's court refuses to hear a federal claim that could otherwise be maintained against the State if the action were filed in federal court. To the contrary, the very reason the respondents herein filed their FLSA suit in state court was because, after *Seminole Tribe*, their suit in federal court clearly could not be maintained in the face of petitioner's Eleventh Amendment immunity. Further, the case at bar does not present a situation in which a state court refused to exercise jurisdiction over a federal claim while, at the same time, entertaining similar suits against State defend-

ants under state law.

Finally, the Supreme Court of Arkansas' reliance on the Supremacy Clause is misplaced because under *Seminole Tribe*, Congress' effort to subject unconsenting States to private FLSA suits exceeded its constitutional authority under the Commerce Clause. *Howlett* involved a claim under 42 U.S.C. § 1983, which Congress enacted pursuant to Section 5 of the Fourteenth Amendment. Unlike the Commerce Clause, Section 5 of the Fourteenth Amendment provides a legitimate source of authority under which Congress can abrogate the States' sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). The Supremacy Clause provides that federal statutory law is the "supreme" law of the land only when it is enacted "in pursuance" of the Constitution. Congress may impose its will upon the States only "[a]s long as it is acting within the powers granted it under the Constitution." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). Because Congress, exercising its power under the Commerce Clause, lacked authority to subject unconsenting states to suit under the FLSA, the FLSA's provisions authorizing suit in state courts against unconsenting states were not enacted in "pursuance" of the Constitution and therefore do not qualify as the "supreme" law of the land that state courts are obligated to enforce.

CONCLUSION

For the foregoing reasons, certiorari should issue to the Supreme Court of the State of Arkansas so that this honorable Court may review and correct the decision below, and resolve the split among state courts on the question of whether unconsenting States are amenable to private FLSA suits in their own courts.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF ARKANSAS

No. 97-310

Richard Jacoby, Freddie Mae Green, Curtis Ivy, Jean Marrow, Elsie Sanchez, Evan Sanders, George Thomas, Barbara Whittaker and Shirley Williams,

Appellants

v.

Arkansas Department of Education, Vocational and Technical Education Division,

Appellee.

[Opinion delivered Feb. 19, 1998.]

Appeal from the Pulaski County Circuit Court, No. CV 96-7731, Hon. Marion Humphrey, Judge, Reversed and Remanded.

Robert L. Brown, Associate Justice. The appellants in this case (the employees) are hourly-paid employees of the Vocational and Technical Education Division of the Arkansas Department of Education (the Department). Their complaint is based on an allegation that the State, through the Department, has failed to pay them for all of the time they have worked. Specifically, they claim that they remained on duty each day for an eight and one-half hour shift but were paid for only eight-hour days.

The employees originally filed their complaint in federal district court and alleged a violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1994

& Supp. I 1995). The Department moved to dismiss for lack of subject-matter jurisdiction, claiming that the United States Congress could not abrogate Eleventh Amendment sovereign immunity for the Department by enacting the FLSA pursuant to the Commerce Clause of the U.S. Constitution. The employees filed a voluntary nonsuit before the motion to dismiss was decided.

The employees next filed this action in state circuit court, claiming once again a violation of the FLSA by the Department. The Department moved to dismiss based on Eleventh Amendment sovereign immunity as set out in the U.S. Constitution and state sovereign immunity under Article 5, Section 20 of the State Constitution. The Department argued that the Claims Commission had exclusive jurisdiction over all suits against the State under Ark. Code Ann. § 19-10-204(a) (Repl. 1994). The circuit court granted the Department's motion to dismiss due to sovereign immunity as provided in the State Constitution and found that the Claims Commission was the proper forum for resolution of this matter.

The question before this court is whether the circuit court correctly determined that the State Constitution bars a suit against the State when a federal claim such as one brought under the FLSA is at issue. A corollary issue is whether the Eleventh Amendment immunizes the State from liability in its own courts when the federal right cannot be pursued in federal courts. We consider the corollary issue first.

a: Eleventh Amendment Sovereign Immunity.

The Eleventh Amendment reads as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity,

> commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment expressly refers to the judicial power of the United States. It has been construed to grant the individual states immunity in federal court unless Congress by law abrogates that immunity or the state waives that immunity. *Welch v. Texas Dep't of Highways & Pub. Trans.*, 483 U.S. 468 (1987); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). It is clear in this case that the Department has not waived its sovereign immunity, and that is not an issue before us. In *Hans v. Louisiana*, 134 U.S. 1 (1890), the U.S. Supreme Court expanded the Eleventh Amendment immunity of the states to exclude all suits by citizens of the same state in federal court.

The issue of whether Congress has effectively abrogated state sovereign immunity in federal courts for FLSA claims was effectively decided by the U.S. Supreme Court in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). In *Seminole Tribe*, the Court held that Congress can only void Eleventh Amendment immunity by enacting law that meets two requirements. First, Congress must "unequivocably express its intent to abrogate the immunity." *Seminole Tribe*, 517 U.S. at 55. It is undisputed in this case that Congress clearly intended to subject states, as employers, to FLSA claims in both federal courts and state courts. *See* 29 U.S.C. § 216(b). Secondly, according to *Seminole Tribe*, Congress must enact the abrogating law pursuant to a valid exercise of authority granted it under the U.S. Constitution. In *Seminole Tribe*, the Court held that Congress failed to meet this second criterion. The congressional act at issue required the states to enter into mediation on Indian claims and was passed under the power given Congress to

regulate commerce with Indian tribes. U.S. Const. art 1, § 8 [3]. This power was not sufficient, according to the Court, to override the states' Eleventh Amendment protection against being sued for these claims in federal court.

But the Court in *Seminole Tribe* went further and overturned its decision in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), where a plurality of the Court had previously determined that the Commerce Clause provided proper authority for Congress to abrogate Eleventh Amendment immunity for the states in federal court. The Commerce Clause was the authority by which Congress provided for FLSA claims to be filed in state and federal courts. Hence, in the wake of *Seminole Tribe*, jurisdiction of the federal courts over state employers for FLSA claims appeared to no longer exist, and several U.S. Courts of Appeal have concluded that is precisely the case. *See Close v. New York*, 125 F.3d 31 (2nd Cir. 1997); *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997); *Moad v. Arkansas State Police Dept.*, 111 F.3d 585 (8th Cir. 1997). We agree that *Seminole Tribe v. Florida, supra*, has effectively immunized state employers from FLSA claims in federal court.

The next question is whether the Eleventh Amendment provides a corresponding immunity for a state employer sued for an FLSA violation in its own courts. A commentator on this subject recently framed the issue thusly:

> Is the immunity conferred on the states by the Eleventh Amendment an immunity from liability under federal law, or is it merely an immunity from the jurisdiction of the federal courts?

Carlos Manual Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1700 (1997).

In *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197 (1991), the Court made the point emphatically that the Eleventh Amendment does not apply to state courts. *Hilton*, 502 U.S. at 204-05, citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989); *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Nevada v. Hall*, 440 U.S. 410 (1979). Indeed, the Court in *Hilton* said that it had noted this inapplicability "on many occasions[.]" *Hilton*, 502 U.S. at 205. We deem it well nigh impossible, in the face of this clear statement, for this court to accept the Department's argument that the Eleventh Amendment provides immunity in state courts as well. We hold that the Eleventh Amendment does not grant states immunity in their own courts, as the Court's pronouncement in the *Hilton* case makes abundantly clear. We reiterate that by its own terms the Eleventh Amendment is limited to the *judicial power of the United States.*

b. State Sovereign Immunity.

We are left then with the crucial issue of state sovereign immunity granted the State of Arkansas by its own State Constitution. Article 5, § 20 of the State Constitution reads: "The State of Arkansas shall never be made a defendant in any of her courts." We have held that this protection fully protects the State absent a waiver or consent by the State to be sued. *See, e.g. Cross v. Arkansas Poultry & Livestock Comm'n*, 328 Ark. 255, 943 S.W.2d 230 (1997). There is no issue of waiver or consent by the Department in the case before us. It relies, rather, on its immunity granted under the State Constitution as a shield against the FLSA claim.

The formidable hurdle that the Department must leap to prevail is the Supremacy Clause of the U.S. Constitution.

U.S. Const. art. 6. When Congress enacted the FLSA, this became the supreme law of the land. The U.S. Supreme Court has stated that federal law is treated "as much [the] law in the States as laws passed by the state legislature." *Howlett v. Rose*, 496 U.S. 356, 367 (1990). The FLSA states that actions "may be maintained against any employer, (including a public agency) in any Federal or State court of competent jurisdiction[.]" 29 U.S.C. § 216(b). The employees contend that though Congress did not have the authority to abrogate Eleventh Amendment immunity for the states in federal courts, its authority to mandate enforcement of this federal right in state courts remains intact. And with the full force of the Supremacy Clause behind them, the employees urge that the supreme law of the land trumps state sovereign immunity granted under the State Constitution.

Again, we find the answer to the question in *Hilton v. South Carolina Public Railways Comm'n, supra.*[1] In this six-to-two decision with one justice not participating, the Court examined whether the State Public Railways Commission could be sued in state court for a Federal Employers' Liability Act (FELA) claim, when the Eleventh Amendment has provided the states with protection against FELA suits in federal courts. The Court first observed that the notion of symmetry, that is, state immunity from liability in both state and federal courts, had much to commend it. Nonetheless, the Court refused to bow to symmetrical considerations. It focused, rather, on *stare*

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[1] Though the employees cite *Hilton v. South Carolina Public Railways Comm'n, supra*, as pivotal authority in their brief, the Department fails to mention, much less discuss the case, in its responding brief.

decisis and on the fact that the Court for 28 years had interpreted the FELA to include claims against state-owned railroads. In its decision in *Welch v. Texas Dept. of Highways & Pub. Trans., supra*, the Court had held that the Eleventh Amendment did not void state immunity in federal court for Jones Act claims. Because of the *Welch* decision and the fact that the Jones Act incorporated the FELA remedial scheme, the plaintiffs in *Hilton* dismissed the federal action and filed in state court.

The Court, therefore, adhered to its precedent that states were liable for FELA claims and noted that the *Welch* decision did not address

> the most vital consideration of our decision today, which is that to confer immunity from state-court suit would strip all FELA and Jones Act protection from workers employed by the States[.]

Hilton, 502 U.S. at 203. Because the FELA did impose liability on the states, the Court concluded that the Supremacy Clause made that law fully enforceable against the states in state courts.

The Court in *Hilton* did not specifically discuss the conflict between the Supremacy Clause and state sovereign immunity, but it cited *Howlett v. Rose*, 496 U.S. 356 (1990), in support of its conclusion. In *Howlett*, a local school board was sued in state court by a former student who alleged that his federal rights were violated under 42 U.S.C. § 1983. The state court dismissed the lawsuit on grounds that the school board, as an arm of the state, had not waived its sovereign immunity in § 1983 cases. The Court, in a unanimous decision, noted that the state dismissal raised concern that the state court may be evading federal law and discriminating against federal causes of

action. It emphasized that § 1983 was the supreme law of the land which state courts were obligated to enforce. The Court then reasoned:

> But as to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage. If we were to uphold the immunity claim in this case, every State would have the same opportunity to extend the mantle of sovereign immunity to "persons" who would otherwise be subject to § 1983 liability. States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People.

Howlett, 496 U.S. at 383. As a result, the Court held that § 1983, as the supreme law of the land, overcame any protection invoked by the school board for state sovereign immunity.

There is precedent in state courts for our holding here today. In *Clover Bottom Hospital and School v. Townsend*, 513 S.W.2d 505 (Tenn. 1975), the Tennessee Supreme Court addressed an issue comparable to what confronts us in the instant case. In *Townsend*, several people sued to recover unpaid wages against the state hospital pursuant to the FLSA in federal court. The suit was dismissed for lack of federal-court jurisdiction under the FLSA as it was then written.[2] The plaintiffs sued next to enforce their FLSA

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[2] The federal district court apparently dismissed the claim because of *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973), where the Court held that Congress had not adequately expressed an intent in the FLSA to counter the Eleventh Amendment immunity for state employers in federal court. The FLSA was later amended to express that intent. *See* Pub. L. No. 93-259 § 6(d)(1) (1974).

claims in state court, and the state hospital moved to dismiss the action due to state sovereign immunity granted under the Tennessee Constitution. The trial court denied the motion, and the Tennessee Supreme Court affirmed. In doing so, the court adopted the reasoning of Justice Marshall in *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973), where he concurred in that decision but underscored the principle that by empowering Congress to regulate commerce, the states necessarily surrendered "any portion of their sovereignty that would stand in the way of such regulation." *Townsend*, 513 S.W.2d at 507, *quoting Employees v. Missouri Public Health Dept.*, 411 U.S. at 288-89, (Marshall, J., concurring). *See also Parden v. Terminal R. Co.*, 377 U.S. 184, 192 (1964), *overruled in part by Welch v Texas Department of Highways & Pub. Trans., supra.*

We agree with the *Townsend* conclusion but, again, underscore the point that in our judgment *Hilton v. South Carolina Public Railways Comm'n, supra*, and *Howlett v. Rose, supra*, decide this issue. Here, the FLSA expressly provides that state courts have jurisdiction over these claims. 29 U.S.C. § 216(b). Furthermore, state employees like the employees in the instant case are clearly entitled to file FLSA claims against state agencies as employers. 29 U.S.C. § 216(b); 29 U.S.C. § 203(d); 29 U.S.C. § 203(x). *See also Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). As already noted, we do not deem the fact that *Seminole Tribe v. Florida, supra*, has struck down state liability for FLSA claims in federal courts as determinative of state liability in its own courts. The FLSA remains valid law protecting employees and empowering them to enforce claims for unpaid wages. This law remains the law throughout the land, and state sovereign immunity cannot impede it.

There is, of course, a uniformity consideration inherent in the principle of supreme law of the land. If the matter is left to the individual states to determine whether state sovereign immunity offers state employers sufficient protection, the result may well be a patchwork quilt of FLSA enforcement with some state courts permitting FLSA claims against state employers and other state courts declining to do so.

We are mindful of the fact that in the past several state appellate courts have not been persuaded that the Supremacy Clause preempts the immunity of a state sovereign against suit in its own courts. *See, e.g., Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422 (Mass. 1991); *Widgeon v. Eastern Shore Hosp. Ctr.*, 479 A.2d 921 (Md. 1984); *Lyons v. Texas A&M Univ.*, 545 S.W.2d 56 (Tex. Civ. App. 14 Dist. 1977); *Mossman v. Donahey*, 346 N.E.2d 305 (Ohio 1976); *Weppler v. School Bd. of Dade County*, 311 So. 2d 409 (Fla. App. 3 Dist. 1975); *Board of Comm'rs v. Splendour Shipping & Ent. Co.*, 255 So.2d 869 (La. App. 4 Dist. 1972); *Gross v. Washington State Ferries*, 367 P.2d 600 (Wash. 1961); *Maloney v. New York*, 144 N.E.2d 364 (N.Y. 1957).

This point of view is perhaps best typified by the Massachusetts Supreme Court in *Morris v. Massachusetts Maritime Academy, supra*. In *Morris*, a cadet (Morris) was killed in a fire on a state training vessel owned by the state, and Morris's estate sued the state Maritime Academy in state court on an admiralty claim for violation of the Jones Act. Jurisdiction for such actions against the state in federal court had previously been held to be foreclosed by the Eleventh Amendment. *See Welch v. Texas Dept. of Highways and Pub. Trans., supra*. The Maritime Academy moved to dismiss on grounds that the state was immune

from suit by virtue of its sovereign immunity. The trial court denied the motion, and the Massachusetts Supreme Court affirmed because the Maritime Academy had consented to the suit.

In its decision, however, the Massachusetts Supreme Court observed that in a line of cases from *Hans v. Louisiana, supra*, forward there was an indication that the U.S. Constitution was confirmed with the implied assumption that state sovereign immunity would continue to exist under the Eleventh Amendment in state and federal courts. To do otherwise, the court reasoned, would create an anomalous situation where the Eleventh Amendment provided protection in one jurisdiction but not in the other, thus demoting the Eleventh Amendment "into nothing more than a choice of forum clause." *Morris*, 565 N.E.2d at 426. The court further voiced concern over a state's being hauled into its own courts as a party by the laws of another sovereign. *Id.* The Court, accordingly, held that the Maritime Academy was protected against suit in state court, absent consent.

There is one point which we find persuasive when considering the *Morris* decision. The decision was premised on the fact that the U.S. Supreme Court had never addressed the precise issue of state immunity in state courts for a federal claim when federal jurisdiction was no longer available. But following the *Morris* decision, the Court did appear to reach the issue in *Hilton v. South Carolina Public Railways Comm'n, supra*, as previously discussed, with its citation to *Howlett v. Rose, supra*. Without consideration of the *Hilton* and *Howlett* decisions, we consider the *Morris* decision as well as the other earlier state court cases to be of little utility in deciding this issue.

We are also aware that some ambiguous language in the *Seminole Tribe* opinion concerning "unconsenting states" has been seized upon as support for the proposition that state consent is a prerequisite to state liability in its own courts for violation of a federal right. Carlos Manual Vazquez, *What is Eleventh Amendment Immunity?* 106 YALE L.J. 1683, 1717 (1997), *citing Seminole Tribe*, 517 U.S. at 72. There is, too, one-sentence dictum in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), that the Eleventh Amendment shields states from suit in federal court "leaving parties with claims against a State to present them, *if the State permits*, in the State's own tribunals." *Hess*, 513 U.S. at 39 (emphasis added). This line of reasoning in favor of state sovereign immunity has its genesis in *Hans v. Louisiana, supra*, and the Court's allusion in that 1890 opinion to the principle that a sovereign cannot be sued in its own courts without its consent or permission. *Hans*, 134 U.S. at 17. We view such passing references, and even the language in *Hans*, as inconsequential when confronted with the full analysis of *Hilton v. South Carolina Public Railways Comm'n, supra*, bolstered by *Howlett v. Rose, supra*, where the issue of the Supremacy Clause was met head-on.

In sum, we have no doubt that the weight of authority favors the employees in this matter. The FLSA now remains to be enforced against state employers only in state courts and is viable only by virtue of the Supremacy Clause. Despite our conclusion, we do not view our decision today as supporting the concept that Congress has unbridled authority under the Commerce Clause to require state courts to enforce federal rights against a state government. But with the history of the FLSA and with the Court's clear message that the Eleventh Amendment is not pertinent to state immunity in state courts, we can only

conclude that the FLSA remains alive and well and that state-court enforcement against its own sovereign has not been foreclosed.

The decision of the circuit court is reversed and this cause is remanded for further proceedings.

Reversed and remanded.

APPENDIX B

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
FIRST DIVISION

Richard Jacoby, Freddie Mae Green, Curtis Ivy, Jean Marrow, Elsie Sanchez, Evan Sanders, George Thomas, Barbara Whittaker and Shirley Williams — Plaintiffs

v. No. CV 96-7731

Arkansas Department of Education, Vocational and Technical Education Division — Defendant

ORDER

Before the court is the Motion to Dismiss of the defendant, Arkansas Department of Education, Vocational and Technical Education Division. Upon a review of the pleadings, the arguments of the parties before the bar of this court, and all other matters and things before the court thereto pertaining, this court doth find and order:

1. This action is based [sic] against the State of Arkansas pursuant to Article V, Section 20 of the Arkansas Constitution.

2. The proper forum for this action is the Arkansas State Claims Commission pursuant to Arkansas Code Annotated Section 19-10-204(a).

3. The Motion to Dismiss should be and is granted.

IT IS SO ORDERED this 26th day of November, 1996.

/s/ Circuit Judge

APPENDIX C

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Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201

March 26, 1998

Karen Virginia Wallace
Assistant Attorney General
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Little Rock, AR 72201

Re: 97 00310 Richard Jacoby v.
Arkansas Dept. of Education-Vo/Tech Division

Dear Ms. Wallace:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied."

Sincerely,

/s/ Leslie W. Steen, Clerk

LWS:rh

cc: John L. Burnett
Carolyn Staley, Clerk
(#CV 96-7731)

Supreme Court, U.S.
FILED
OCT 5 1998
OFFICE OF THE CLERK

(2)

No. 98-04

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ARKANSAS DEPARTMENT OF EDUCATION,
VOCATIONAL AND TECHNICAL
EDUCATIONAL DIVISION,
Petitioner,

v.

RICHARD JACOBY, FREDDIE MAE GREEN,
JEAN MARROW, ELSIE SANCHEZ, EVAN SANDERS,
GEORGE THOMAS, BARBARA WHITTAKER,
and SHIRLEY WILLIAMS,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

---

MEMORANDUM FOR RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-04

ARKANSAS DEPARTMENT OF EDUCATION, VOCATIONAL AND TECHNICAL EDUCATIONAL DIVISION,

Petitioner,

v.

RICHARD JACOBY, FREDDIE MAE GREEN, JEAN MARROW, ELSIE SANCHEZ, EVAN SANDERS, GEORGE THOMAS, BARBARA WHITTAKER, and SHIRLEY WILLIAMS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

---

MEMORANDUM FOR RESPONDENTS

The respondents, Richard Jacoby *et al.*, do not oppose the grant of the Arkansas Department of Education's *certiorari* petition in the instant case. The petition (at pp. 4-7) fairly and succinctly states the procedural history and nature of this case and the essence of the Arkansas Supreme Court's decision. So as not to burden the Court we accept that statement for present purposes.

The Arkansas Supreme Court's decision—which upholds the validity of an Act of Congress—is, we believe, entirely correct, both in its basics and in its understanding of this Court's precedents. If that decision stood alone, we would argue against further review by this Court and do so on that ground.

But, we recognize that the decision below does not stand alone. The question of the interplay between Congress' Article I legislative powers and state sovereign immunity presented by this case and squarely decided by the Arkansas Court is a recurring one, is most certainly a question of importance and—particularly after this Court's decision on a related Article I/Eleventh Amendment question in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)—is a question that has generated a current, live conflict in the state courts.

That conflict is most evident from *Alden et al. v. State of Maine*, 715 A.2d 172 (Me. 1998) pet. for *cert.* filed September 14, 1998 (No. 98-436). In *Alden*, as in this case, state employees brought a state court Fair Labor Standards Act overtime pay lawsuit against a State. And, the Maine Supreme Judicial Court, in a decision issued less than 6 months after the Arkansas Court's decision herein, upheld the State's sovereign immunity claim and non-suited the state employee plaintiffs. The Maine Court thus rendered Congress' legislative action in authorizing such suits null and void and did so in the face of the Arkansas Court's decision recognizing the force and effect of the same Act of Congress.

The Arkansas and Maine decisions, moreover, are in conflict not only in result but in their understanding of this Court's precedents and, ultimately, of the nature and extent of Congress' Article I powers, the nature and extent of the States' sovereign status in our federal system, and the constitutional plan for allocating federal authority and state authority in this regard.

As to this conflict in the lower state courts see Pet. 9-10 (citing both pre-*Seminole Tribe* and post-*Seminole Tribe* state court decisions), as well as the following decisions (in addition to the *Alden* decision discussed above) issued after the petition here was filed: *Whittington v. State of New Mexico Dept. of Public Safety*, N.M. Ct. App. Docket No. 19,065 (September 3, 1998); *Alhern et al. v. State of New York*, N.Y. Sup. Ct., App. Div., No.

80430, 1998 WL 38623 at *2 (July 9, 1998); and *Bunch v. Robinson*, 122 Md. App. 437, 712 A.2d 585, 595 (Md. Ct. Spec. App., 1998) pet. for *cert.* to Maryland Court of Appeals pending.

CONCLUSION

In light of the foregoing, respondents do not oppose a grant of the petition for a writ of certiorari in this case.[1]

Respectfully submitted,

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---

[1] We note that if the Court were to grant *certiorari* here the Court might also wish to grant *certiorari* in *Alden et al. v. State of Maine*, No. 98-436, and to consolidate the two cases for argument and consideration.

The *Alden* case presents a second significant related question that is not presented by the instant case, and that may furnish a separate basis for decision in that case. (That question is "If a state court may properly refuse to entertain . . . a federal statutory private party action on the basis of state sovereign immunity in certain circumstances but not in others, may a state court do so in the circumstance in which that court entertains analogous state statutory actions?" *Alden* Pet. i.)

Hearing both cases together would thus provide the Court with a clear opportunity to consider and resolve both aspects of the current Article I/state sovereign immunity legal controversy in a single proceeding.